



In the Matter of:

MARCOLM CARTER,

COMPLAINANT,

v.

GDS TRANSPORT, LTD.,

RESPONDENT.

ARB CASE NO. 08-053

ALJ CASE NO. 2006-STA-009

DATE: February 27, 2009

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondent:

Ricardo Ortiz, Esq., *Bickerstaff Heath Delgado Acosta, LLP*, El Paso, Texas

FINAL DECISION AND ORDER

Marcolm Carter filed a complaint with the United States Department of Labor alleging that his former employer, GDS Transport, Ltd. (GDS), terminated his employment in violation of the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA)¹ and its implementing regulations.² Following a hearing, a Department of Labor Administrative Law Judge (ALJ) determined

¹ 49 U.S.C.A. § 31105 (West 2008). The STAA has been amended since Carter filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not determine whether the amendments are applicable to this case because they would not affect our review even if they were.

² 29 C.F.R. Part 1978 (2007).

that Carter failed to establish that GDS violated the STAA. Accordingly, the ALJ recommended that Carter's complaint be dismissed.³ Upon review of the record and the ALJ's R. D. & O., we accept the ALJ's recommendation and dismiss Carter's complaint.

BACKGROUND

GDS, a Texas-based company, operated commercial vehicles under a contract with Texas Instruments (TI) to provide daily shuttle bus service for TI employees to and from public transportation terminals and the employees' worksites. GDS hired Carter in November 2006 as a shuttle bus driver.⁴

Carter regularly drove Bus 75.⁵ During April and May 2007, Carter made verbal and written complaints to GDS about numerous safety problems with Bus 75, including a broken horn, broken door, brake problems, bald tires, and the brake warning light staying on.⁶ In late May, Carter became concerned about the air conditioning system in the passenger compartment of Bus 75. The air conditioning unit in the driver compartment was working, but passengers were complaining to him about the heat in the rear passenger compartment.⁷

On May 30, 2007, Carter called Rick Schuler, GDS Operations Manager, to complain about the air conditioner, and Schuler hung up on him, allegedly because Carter was yelling at him.⁸ But Carter denied that he yelled at Schuler.⁹ Carter then called Curtis Woodley, Assistant Supervisor, who said he would look into the problem, and Alex Castillo, Director of Operations, who told Carter that GDS was taking the bus out of service and replacing it because repairing the air conditioning system would be too expensive. On May 31, 2007, Carter refused to drive Bus 75, stating that he refused to drive the "hot" bus. Since no other bus was available for him to drive, Carter walked off the job. On the next day GDS terminated Carter's employment for job abandonment.

Carter filed a complaint with the Labor Department's Occupational Safety and Health Administration (OSHA) on June 25, 2007, alleging that GDS terminated him

³ Recommended Decision and Order (R. D. & O.) at 7.

⁴ Administrative Law Judge Exhibit (Exh.) 1.

⁵ Tr. at 158.

⁶ Tr. at 9-26.

⁷ Tr. at 86, 88, 97.

⁸ Tr. at 209.

⁹ Tr. at 107.

because he had complained about safety issues with regard to the operation of Bus 75. In its September 21, 2007 findings, OSHA found that Carter's complaint had no merit.¹⁰ Carter requested a hearing before an ALJ on October 19, 2007.¹¹ The ALJ held a hearing on December 12, 2007, at which Carter appeared pro se. In his R. D. & O. dated February 7, 2008, the ALJ recommended that we dismiss Carter's complaint.

This case comes before the Board under the STAA's automatic review provisions.¹² Carter did not respond to the Board's notification that each party had the right to file a brief supporting or opposing the ALJ's R. D. & O. GDS responded by submitting a copy of a letter brief entitled "Closing Summary," which it had submitted to the ALJ after the hearing.

JURISDICTION AND STANDARD OF REVIEW

The Board reviews an ALJ's findings of fact under the substantial evidence standard, meaning we are bound by the ALJ's factual findings if the record considered as a whole supports those findings.¹³ Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁴ Since the ARB is the Secretary's designee and acts with "all the powers [the Secretary] would have in making the initial decision . . .,"¹⁵ the Board reviews the ALJ's conclusions of law de novo.¹⁶

¹⁰ ALJ Exh. 1.

¹¹ *Id.*

¹² 29 C.F.R. § 1978.109(a). The Secretary of Labor has delegated her authority to issue final agency decisions under the STAA to the Administrative Review Board. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. Part 1978 (2007).

¹³ 29 C.F.R. § 1978.109(c)(3).

¹⁴ *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

¹⁵ 5 U.S.C.A. § 557(b) (West 2008).

¹⁶ *See Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993).

DISCUSSION

To prevail under the STAA, a complainant must demonstrate by a preponderance of the evidence that he engaged in protected activity; that his employer was aware of the protected activity; that his employer discharged, disciplined or discriminated against him; and that the employer took the adverse action because the complainant engaged in the protected activity.¹⁷ STAA-protected activities include making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard or order.”¹⁸ The STAA also protects refusals to operate a vehicle because “the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health,” and because “the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.”¹⁹ Since Carter refused to operate the vehicle, we consider the applicability of his complaint under both STAA provisions. We find that substantial evidence supports the ALJ’s decision that Carter’s termination did not violate the STAA.

Protected Activity

At the hearing before the ALJ, GDS did not refute Carter’s claim that he had complained to his supervisors about the horn, brakes, tires, and door of Bus 75. In fact, GDS presented testimony and evidence that it had addressed Carter’s concerns and remedied any that it found valid.²⁰ It is undisputed that Carter’s complaints related to commercial motor vehicle safety violations. We therefore accept the ALJ’s conclusion that Carter engaged in protected activity when he raised safety concerns in April 2007.

The ALJ also correctly concluded that Carter’s refusal to drive on May 31 was not protected activity. The ALJ found that “[v]oicing complaints about [a] faulty air conditioning system during a five- to ten-minute bus ride is not a safety concern . . . classified as protected activity under the Act.”²¹ We agree with the ALJ’s conclusion that Carter’s refusal to drive was not protected activity because it was not based on a

¹⁷ See *Carter v. Barclay, Inc.*, ARB No. 06-154, ALJ No. 2006-STA-022, slip op. at 3-4 (ARB April 28, 2008); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 03-095, ALJ No. 2002-STA-035, slip op. at 7 (ARB Aug. 6, 2004).

¹⁸ 49 U.S.C.A. § 31105(a)(1)(A) (West 2008). See *Zurenda v. J & R Plumbing & Heating Co., Inc.*, ARB No 98-088, ALJ No. 1997-STA-016, slip op. at 5 (ARB June 12, 1998) (“Under STAA a safety complaint to any supervisor, no matter where that supervisor falls in the chain of command, can be protected activity.”).

¹⁹ 49 U.S.C.A. § 31105(a)(1)(B)(i),(ii).

²⁰ Tr. 164-185; Employer’s Exh. 6, Addenda E and F.

²¹ R. D. & O. at 7.

reasonable belief that driving the bus would violate a federal regulation, standard, or order related to commercial motor vehicle safety or health, or on a “reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.”²²

We also agree with the ALJ’s determination that when Carter walked off the job, he did so because of his dissatisfaction with Bus 75’s air conditioning system, and not because of a perceived safety concern. The hearing testimony supports the ALJ’s determination. Curtis Woodley, an assistant supervisor for GDS, who was also in charge of bus repair, testified that on May 30, 2007, Carter called him to ask what GDS was going to do about the air conditioner. Woodley offered Carter the opportunity to drive another bus, starting at 3 p.m., but Carter replied that he would just finish the day on Bus 75.²³ On the same day, Carter also called Rick Schuler, GDS Operations Manager, demanding that he do something about the air conditioner on Bus 75.²⁴ Woodley also testified that when Carter left the job on May 31, Carter said that he did not want to drive the “hot” bus.²⁵

The record evidence supports the ALJ’s determination that the faulty air conditioner was not a safety concern. Woodley and Schuler both testified that they did not think that the faulty air conditioner created an unsafe condition on the bus.²⁶ Carter presented no evidence that the rear air conditioning system posed any danger to passengers during their 5- to 10-minute commutes. Indeed, he acknowledged at the hearing that it was not a safety concern.²⁷ We therefore accept the ALJ’s determination that Carter’s refusal to drive because of his concern about the faulty air conditioning system was not protected activity.

Causation

The ALJ found that Carter engaged in protected activity when he complained about problems with the horn, brakes, tires, and door on Bus 75. There is no dispute that GDS was aware of Carter’s protected activity and that Carter’s termination was an adverse action. Therefore, Carter could prevail if he proved by a preponderance of the evidence that GDS terminated his employment because of his protected activity.

²² 49 U.S.C.A. § 31105(a)(1)(B)(i),(ii).

²³ Tr. at 183-184.

²⁴ Tr. at 209.

²⁵ Tr. at 189.

²⁶ Tr. at 183-184, 225.

²⁷ Tr. at 97.

Carter presented no direct evidence that GDS retaliated against him because of his protected activity. Even so, he can succeed if he proves by a preponderance of evidence that the reason GDS proffered for his termination – abandonment of his job - was not the true reason for the adverse action, but instead was a pretext.²⁸ To establish pretext, it is not sufficient for Carter to show that the action taken was not “just, or fair, or sensible . . . rather he must show that the explanation is a phony reason.”²⁹ The ALJ found that Carter did not prove pretext.³⁰ Substantial evidence supports this finding.

GDS’s proffered reason for terminating Carter’s employment was that he abandoned his job when he refused to drive Bus 75 on May 31, 2007. Carter presented no credible evidence that GDS’s proffered reason was a pretext or evidence that GDS terminated him in retaliation for his complaints. Although he alleged that GDS had failed to remedy some of the unsafe conditions he had noted on his inspection reports, he failed to rebut Woodley’s testimony describing each action that the company had taken to inspect and repair the faulty equipment, including the air conditioner. The daily bus inspection forms and invoices presented at the hearing demonstrate that GDS followed up on the problems that were the subjects of Carter’s complaints and remedied any problems related to vehicle safety.³¹ Furthermore, the inspection reports and testimony of other employees demonstrate that GDS had in place a process requiring that drivers inspect their buses daily before their shifts and report safety issues to their supervisors. Two employees, Don Dean and Duana Craig, both of whom drove Bus 75, testified that they felt free to report safety concerns, but had not reported any concerns with Bus 75.³² Duana Craig stated that in the past she had reported concerns and refused to drive another bus, and GDS had provided her with a replacement bus. She experienced no problems with the company because she refused to drive the bus.³³ Thus, the record contains substantial evidence to support the ALJ’s finding that GDS terminated Caldwell for abandonment of his job, and not for his protected activity.

²⁸ See *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. at 14 (ARB May 27, 2007).

²⁹ *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-038, slip op. at 9 (ARB July 31, 2002) (citation omitted).

³⁰ R. D. & O. at 7.

³¹ Tr. at 164-185; Employer’s Exh. 6, Addenda E and F.

³² Tr. at 230, 238-239.

³³ Tr. at 240-241.

CONCLUSION

Carter had the opportunity to challenge the ALJ's findings on appeal to us, but he chose not to do so. Carter has not proven on the record before us that he was terminated for engaging in protected activity. Upon review, we find that substantial evidence supports the ALJ's findings of fact and that he has correctly applied the law. Therefore, we **AFFIRM** the ALJ's recommendation and **DISMISS** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge